

## Trends

### A Review of Some Recent Cases and Other Current Developments of Significance to International Lawyers

Gazed at too intently, for too long, almost any group of legal decisions is apt to give the appearance of consequentiality. So, in looking for evidence of trends which are likely to prove of abiding importance to international lawyers, one is disposed to proceed warily, withholding judgment until the emergence of a trend seems irrefutable. What can one say, then, to vindicate the hunch—it is no more than that—that the following developments anticipate and predict an imminent encounter, or series of encounters, involving the federal judiciary, the Constitution and contemporary international law? Nothing will do but to tell it as it is, or seems to be, and hope that the hunch vindicates itself.

#### Antitrust and Act of State

Since it was first enunciated in *Underhill v. Hernandez*,<sup>1</sup> the act of state doctrine has usually been raised as a defense in suits involving a disputed claim to title to property expropriated abroad by a foreign government. But for the past three years many of the most important decisions bearing on that doctrine have involved private antitrust actions. This year that trend is becoming more pronounced, and so is evidence that leading federal courts are finding antitrust case law a convenient vehicle for developing a formula to settle the confusion which exists over the extent to which an act of state precludes judicial inquiry in specific instances.

In *Underhill*, the Supreme Court said that “every sovereign state is bound to respect the independence of every other sovereign state, and the courts of

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<sup>1</sup>168 U.S. 250 (1897).

one country will not sit in judgment on the acts of the government of another done within its own territory.”<sup>2</sup> The opinion, especially as encapsulated in the foregoing, often-quoted dictum, speaks the language of international comity. For that matter, so do most of the other judicial pronouncements on the act of state doctrine until 1964, when the Court, asked in *Banco Nacional de Cuba v. Sabbatino*<sup>3</sup> to decide whether the doctrine precludes inquiry into the validity of a foreign governmental act under international law, read the earlier cases in the light of an interpretation of the so-called political question doctrine it had only recently pronounced in *Baker v. Carr*.<sup>4</sup> The latter case involved a challenge to the constitutionality of a legislative reapportionment of voting districts. Some fifteen years earlier, in *Colegrove v. Green*,<sup>5</sup> the Court had found such issues to be political questions, in the sense that they are constitutionally allocated to the political branches, not the courts, to resolve. *Baker v. Carr* completely repudiated *Colegrove*, without the benefit of a materially different set of facts. Accordingly, Justice Brennan, writing for the majority in *Baker*, undertook a survey of case law to show that the Court’s opinion in *Colegrove* represented an aberration from the mainstream of its decisions on the political question issue. For this purpose, Justice Brennan sought to identify in the decisions he surveyed a pattern of decisional rationale. One area he chose as illustrative was foreign relations, and among the factors he found to have been of critical importance to the Court in determining whether an issue bearing upon the conduct of foreign relations was a “political question” were several which came to play a material part in the Court’s reasoning, less than two years after *Baker*, in the *Sabbatino* case. One in particular was whether judicial consideration of an issue could embarrass the executive branch in carrying out its constitutional responsibility for the conduct of foreign relations.

At issue in *Sabbatino* was the effect to be given by American courts to Cuba’s nationalization of certain American-owned property. To a majority of the Court, that was precisely the sort of issue it was referring to in *Baker*. The act of state doctrine, they concluded, rests on constitutional underpinnings.

In a vigorous dissent to the majority’s opinion in *Sabbatino*, Justice White said he was “dismayed that the Court has, with one broad stroke, declared the ascertainment and application of international law beyond the competence of the courts of the United States in a large and important category of cases.”<sup>6</sup> In fact, a reading of the Court’s opinions in *Baker* and *Sabbatino* suggests that the majority meant to recommend a case by case analysis of the

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<sup>2</sup>*Id.* at 252.

<sup>3</sup>376 U.S. 398 (1964).

<sup>4</sup>369 U.S. 186 (1962). It is at least arguable that *Sabbatino* did away with the “old” act of state doctrine in all but name, replacing it with one rooted, if not in the Constitution itself, as the Court said, then in prudential notions of judicial self-restraint.

<sup>5</sup>328 U.S. 549 (1946).

<sup>6</sup>376 U.S. at 439.

political sensitivity of issues coming before the courts. However, the case law since *Sabbatino* appears to support Justice White's perception of the decision's real impact. Rightly or wrongly, the act of state doctrine has come to imperil a wide range of litigation whose outcome turns on an issue having substantial transnational implications.

Efforts to get the Court to restrict the impact of *Sabbatino* have encountered a sharp division of opinion among the justices. Best evidence of this is the even split among the eight justices who considered *Alfred Dunhill of London, Inc. v. Republic of Cuba*.<sup>7</sup> Writing for the four who comprised the majority, Justice White said that the act of state doctrine admits of an exception with respect to acts of a foreign government which are commercial in nature. However, several courts have questioned whether all of the justices who formed the majority were actually in accord on this point.<sup>8</sup> The dissenting justices clearly disputed it. In any event, only the Second Circuit appears to regard the commercial exception enunciated by Justice White in *Dunhill* as the opinion of the Supreme Court itself.<sup>9</sup>

The case which occasioned the Second Circuit's perhaps wishful endorsement of a commercial exception to the act of state doctrine coincided, more or less, with a shift in the pattern of cases bringing the issue to the courts from claims concerning title to expropriated property to allegations of conspiracies to restrain trade in violation of American antitrust laws. The foreign governmental act challenged or implicitly drawn into question in these cases usually has involved participation in such a conspiracy. Commentators have been warning that a reading of *Sabbatino* which causes the courts to treat as immune from judicial scrutiny private acts aimed at instigating foreign government action to restrain trade would have the effect of encouraging further acts of this sort.<sup>10</sup>

The presence of one such conspiracy was implicit in *Hunt v. Mobil Oil Corp.*,<sup>11</sup> one branch of a network of litigation growing out of Libya's nationalization of oil drilling rights following the rise to power of Colonel Muammar al-Qadhafi in 1969. Plaintiffs charged that defendant oil companies had engaged in a conspiracy to preserve the competitive advantage of Persian Gulf crude oil over that of Libyan crude oil by preventing plaintiffs from reaching a settlement in their dispute with Libya, to the extent that plaintiffs' concession eventually was nationalized by the Libyan government. The complaint did not name Libya as a defendant or co-conspirator of the

<sup>7</sup>425 U.S. 682 (1976).

<sup>8</sup>See *Hunt v. Coastal States Gas Producing Co.*, 570 S.W.2d 503 (Fourteenth Court of Civil Appeals, Houston, 1978); and *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329 (E.D.N.Y. 1977).

<sup>9</sup>See *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977).

<sup>10</sup>See Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 COLUM. L. REV. 1247 (1977); and Davidow, *Antitrust, Foreign Policy, and International Buying Cooperation*, 84 YALE L.J. 268 (1974).

<sup>11</sup>410 F. Supp. 10 (S.D.N.Y. 1976).

named defendants. However, District Judge Edward Weinfeld reasoned that the alleged conspiracy did not of itself cause the damage plaintiffs complained of. Rather, he said, the damage resulted from Libya's action in cutting back plaintiffs' production, shutting off their oil, and finally nationalizing their properties. So, plaintiffs would have to show that but for the conspiracy Libya would not have committed any of these acts. But this, he concluded, and the Second Circuit subsequently affirmed,<sup>12</sup> would require judicial inquiry into the acts and conduct of Libyan officials of the very sort precluded by the act of state doctrine.

The Supreme Court denied certiorari.<sup>13</sup> Prior to doing so, it had asked the Justice Department to comment on appellants' contention that Judge Weinfeld's ruling, as affirmed, would carve a large loophole in the antitrust laws. In response, the Department had urged the high court to review the decision, observing that it "may have a significantly adverse effect on both governmental and private enforcement of the anti-trust laws against corporations engaged in international transactions." One cannot know whether the Court really agreed with Judge Weinfeld and the Second Circuit, or simply found the risk referred to by the Justice Department an insufficiently compelling reason to attempt to modify the act of state doctrine itself, given the continuing division among the justices on this point. Whatever its reason, the Court denied certiorari.

Faced with this impasse, key federal circuit and district courts have been looking back to the *Sabbatino* opinion itself in the hope of finding previously neglected directives. Several recent decisions have seized upon that aspect of the Court's opinion in *Sabbatino* which, in retrospect at least, seems to invite lower courts to determine in each instance whether a due concern for the separation of governmental powers precludes them from proceeding to resolve a contested issue. In *Timberlane Lumber Co. v. Bank of America*,<sup>14</sup> for example, the Court of Appeals for the Ninth Circuit, upon noting that it wished to avoid passing on the validity of foreign acts of state, or indeed challenging "the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action,"<sup>15</sup> nonetheless observed that *Sabbatino* cautions that "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."<sup>16</sup> At issue in *Timberlane* were Honduran laws concerning security interests and the protection of the underlying property against diminution. The Ninth Circuit said that the application of these laws by Honduran courts, and their agents, was not of the magnitude of foreign government acts protected by the act of state doctrine.

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<sup>12</sup>550 F.2d 68 (2d Cir. 1977).

<sup>13</sup>434 U.S. 984 (1977).

<sup>14</sup>549 F.2d 597 (9th Cir. 1976).

<sup>15</sup>*Id.* at 607.

<sup>16</sup>376 U.S. at 428.

A similar approach was taken by the Third Circuit last spring in *Mannington Mills, Inc. v. Congoleum Corporation*,<sup>17</sup> in which it held that the granting of patents by a foreign state is merely a ministerial activity, not the kind of governmental action contemplated by the act of state doctrine or its correlative, foreign compulsion.<sup>18</sup> In *Mannington*, a licensee of defendant's United States patents alleged that defendant set out to monopolize foreign trade relating to chemically embossed vinyl floor covering by fraudulently securing patents in twenty-six foreign countries, thereby giving it (defendant) the power to prevent American competitors from shipping such material to purchasers in those countries. The Third Circuit held that the act of state doctrine does not bar consideration of plaintiff's claim and it remanded the case to the district court with instructions to "weigh the enforcement of the antitrust laws against the interests of comity and international relations."<sup>19</sup>

Three weeks after *Mannington Mills* was decided, the Fifth Circuit held in *Industrial Investment Development Corp. v. Mitsui & Co.*<sup>20</sup> that the act of state doctrine does not preclude inquiry into the motivation attending a foreign government's act or conduct where it is relevant only to the measure of, not the fact of, damages. The facts in the case were strikingly similar to those presented by *Hunt v. Mobil Oil*. Plaintiffs alleged a conspiracy which resulted in their being denied a concession and contract rights by a foreign government, which government was named neither as codefendant nor as coconspirator. But the Fifth Circuit disagreed with the opinions of Judge Weinfeld and the Second Circuit in *Hunt* "that motivation and validity are equally protected by the act of state rubric."<sup>21</sup> Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act," it added, "would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action."<sup>22</sup>

Plaintiffs in *Industrial Investment* had urged the Court to apply the "commercial exception" doctrine enunciated by Justice White in *Dunhill*. The Fifth Circuit sidestepped that issue, noting that only the Second Circuit had treated that exception as well established, and agreeing with the Ninth Circuit in *Timberlane Lumber* that it was necessary to weigh the political factors in the case against the United States' interest in regulating anticompetitive activ-

<sup>17</sup>595 F.2d 1287 (3d Cir. 1979).

<sup>18</sup>This corollary, which has emerged in cases involving foreign trade aspects of antitrust law, is the principle that corporate conduct which is compelled by a foreign sovereign is also protected from antitrust liability. See *Timberlane Lumber Co.*, *supra*, at 606; and *Interamerican Refining Corp. v. Texaco Maracaibu, Inc.*, 307 F. Supp. 1291 (D.Del. 1970).

<sup>19</sup>595 F.2d at 1290.

<sup>20</sup>594 F.2d 48 (5th Cir. 1979).

<sup>21</sup>*Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977).

<sup>22</sup>594 F.2d at 55. *Industrial Development* concerns a joint venture entered into between an Indonesian company and plaintiffs for the purpose of engaging in the logging and lumber products business in Indonesia. Plaintiffs allege that defendant corporation infiltrated and usurped control of the Indonesian company and disrupted the joint venture, thereby causing the Indonesian Department of Forestry to cancel the joint venture agreement and to deny plaintiffs a timber-cutting concession.

ity here and abroad. The foreign government's right to withhold the relevant license is not questioned, the court said, distinguishing both *Sabbatino* and *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*<sup>23</sup> "The challenge is that a commercial endeavor failed by virtue of external disruptive forces acting on the contractual relationship between private citizens . . . No ethical standard is set by which the propriety of its decision is tested. Surely the limited nature and effect of determining the proportional cause of plaintiffs' damage allocable to defendants' conduct does not trigger the type of special political considerations protected by the act of state doctrine."<sup>24</sup>

The most recent case on point, *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*,<sup>25</sup> involves an allegation that defendants conspired to monopolize tourist facilities in the La Romana section of the Dominican Republic. Plaintiffs were affiliated in an endeavor to establish hotel and condominium accommodations there. They claim that defendants Gulf & Western, several of its subsidiaries, and the Dominican Tourist Information Center hindered their efforts. Defendant Gulf & Western, which owns and operates a tourist resort in La Romana, argues, *inter alia*, that the acts complained of, even if true, had only a minimal effect on interstate commerce in the United States. But the motions immediately before the court for partial summary judgment, especially defendants' motions for dismissal,<sup>26</sup> put the focus of the proceedings squarely on the applicability of the act of state doctrine.

The court denied the motions, instead ordering further hearings to develop the record on the question of the character of the governmental acts involved. Plaintiffs, for instance, are claiming that the actions taken by officials of the Dominican government were done at the behest of Gulf & Western and did not represent government policy. Mindful of its own circuit's construction of the act of state doctrine, the district court observed that some of the acts alleged in the complaint fall outside the doctrine's penumbra. It noted that defendant Dominican Tourist Information Center, although operating under a government sanction, is apparently a private enterprise not entitled to immunize its own conduct under the act of state doctrine. Therefore, it concluded, the claim that the Center conspired with Gulf & Western to steer tourists to G & W's resort and away from plaintiffs' is subject to judicial scrutiny. Similarly, it regarded allegations concerning the initiation of meritless judicial proceedings abroad as outside the doctrine's protection, even though foreign courts are responsible for the ultimate outcome of the proceedings before them.

The court found more difficult allegations involving acts of Dominican government authorities performing arguably commercial functions. "It is

<sup>23</sup>461 F.2d 1261 (9th Cir.1972).

<sup>24</sup>594 F.2d at 55.

<sup>25</sup>No. 78 Civ. 4120 (RLC) (S.D.N.Y. July 12, 1979), LEXIS retrieval of slip op.

<sup>26</sup>Defendant Dominican corporation also moved for dismissal, alleging lack of in personam jurisdiction.

problematic," the court said, "whether closing the La Romana Airport to the plaintiffs, ordering their marina to be dismantled, and rerouting the road that would serve [plaintiffs' resort]—all acts alleged to have been part of a conspiracy to injure [plaintiffs'] business—were acts engaged in pursuant to the police power of the authorities or acts of a commercial nature."<sup>27</sup> It was inappropriate to make such a determination on the record before the court without permitting further discovery.

The court also considered the relevance of the act of state doctrine to plaintiffs' allegation that in furtherance of the conspiracy the Dominican government expropriated plaintiffs' property in order to create a national park. Such an act would at first blush seem to be a quintessential public act falling squarely within the doctrine. However, plaintiffs alleged that the Dominican government subsequently rescinded its confiscation order when it discovered "it had been duped by G&W."<sup>28</sup> If true, the court said, that would bring the otherwise immune act out from under the doctrine's protection. Likewise, if the act, however public, resulted from the corruption of government officials, it would not enjoy immunity from scrutiny by American courts.

Because they also turn on the issue of extraterritorial limits to subject matter jurisdiction under American antitrust laws, *Timberlane Lumber, Mannington Mills* and *Dominicus Americana* bring judicial consideration of the act of state doctrine almost full circle to its Supreme Court origins. *American Banana Co. v. United Fruit Co.*,<sup>29</sup> decided in 1909, involved one of the few early instances of an act of state case brought in the context of antitrust law. The holding of the Court on the issue of jurisdiction is regarded as obsolete,<sup>30</sup> being a victim of judicial recognition that the strong public policy embedded in the antitrust laws would be undermined if extraterritorial jurisdiction were denied.<sup>31</sup> But it ultimately paved the way for the "effects test" promulgated by Judge Learned Hand in *United States v. Aluminum Co. of America*,<sup>32</sup> according to which even wholly foreign conduct may come within the scope of the antitrust laws if it has a significant effect on the interstate or foreign commerce of the United States.<sup>33</sup>

But the "effects test" has proven to be controversial, too, not least, as the district court noted in *Dominicus Americana*, "because it fails to take into account potential problems of international comity."<sup>34</sup> So, it seems, the

<sup>27</sup>No. 78 Civ. 4120 (RLC) (S.D.N.Y. July 12, 1979), LEXIS retrieval of slip op.

<sup>28</sup>*Id.*

<sup>29</sup>213 U.S. 347 (1909).

<sup>30</sup>*See* *Hunt v. Mobil Oil Corp.*, 550 F.2d at 75; and *Timberlane Lumber Co. v. Bank of America*, 549 F.2d at 608, 609.

<sup>31</sup>*See* *Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance*, 451 F.2d 727 (2d Cir. 1971).

<sup>32</sup>148 F.2d 416 (2d Cir. 1945).

<sup>33</sup>*See* *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-705 (1962).

<sup>34</sup>Foreign criticism of the zeal with which United States antitrust laws are enforced extraterritorially appears to be increasing. *See Trends*, 13 INT'L. LAW. 397 (1979).

otherwise apparently unconnected issues of the limits of subject matter jurisdiction over foreign conduct allegedly in violation of United States antitrust laws, on the one hand, and the extent to which the act of state doctrine precludes judicial scrutiny of the validity of foreign government acts, on the other, are once again before the courts in the same cases, as in *American Banana*.

*Mannington Mills* indicates how interrelated the two issues have become. The three appellate judges, while deciding the act of state issue specifically on the basis of the character of the foreign governmental acts involved, endorsed the balancing of interests approach developed by the Ninth Circuit in *Timberlane Lumber* as to the extraterritorial jurisdiction issue. Judges Weiner and Weis, in fact, elaborated on the Ninth Circuit's approach, adducing no less than ten factors which lower courts should consider in deciding whether they have the requisite jurisdiction, namely:

- (i) degree of conflict with foreign law or policy;
- (ii) nationality of the parties;
- (iii) relative importance of the alleged violation or conduct here compared to that abroad;
- (iv) availability of a remedy abroad and the pendency of litigation there;
- (v) existence of intent to harm or affect American commerce and its foreseeability;
- (vi) possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
- (vii) if relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
- (viii) whether the court can make its order effective;
- (ix) whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
- (x) whether a treaty with the affected nations has addressed the issue.<sup>35</sup>

The suitability of some or all of these factors to judicial determination of the applicability of the act of state doctrine seems clear.

Besides seeking treble damages, plaintiff had asked the court to enjoin the defendant from enforcing its hypothetically valid patents in the foreign jurisdictions. "Obviously," the Third Circuit said, "some potential for conflict with the policy of foreign nations is present in both forms of relief." But it added this:

This may, indeed, be a situation where the consequences to the American economy and policy permit no alternative to firm judicial action enforcing our antitrust laws abroad. But before the step is taken, there should be a weighing of competing interests. . . . In a purely domestic situation, the right to a remedy would be clear. When foreign nations are involved, however, it is unwise to ignore

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<sup>35</sup>595 F.2d at 1297-98 (3d Cir. 1979).



the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction.<sup>36</sup>

All in all, it seems fair to suggest that the jurisprudence of antitrust law is being refined in a way that could have a material effect on the way the act of state doctrine is interpreted and applied.<sup>37</sup>

### Standby Letters of Credit in International Trade

A side effect of the revolution which toppled the Imperial Government of Iran has been extensive litigation in the United States bearing upon the use of standby letters of credit to finance international trade. In most of the suits, plaintiffs are American companies seeking to enjoin banks from making payment on irrevocable letters of credit issued by them in favor of Iranian banks prior to the revolution. Although the decisions have not been entirely uniform, they have usually run against plaintiffs, and the issues and factors considered by the courts have tended to be the same regardless of the conclusions they have drawn from them.

Standby letters of credit have become a staple of international trade. Basically, a letter of credit is a commitment on the part of the issuing bank that it will pay a draft or demand for payment to it under the terms of the credit. There are usually three distinct contracts involved in a letter of credit transaction: the contract of the bank with its customer by which it undertakes to issue the letter of credit; the letter of credit itself; and the underlying contract of sale, ordinarily between the buyer who has procured the issuance of the letter of credit and the seller who is given the right to present drafts thereunder.<sup>38</sup>

However, in most of the cases spawned by the turmoil in Iran the seller had procured the letter of credit, from an American bank, as a guaranty of the seller's own performance. And the beneficiary of the letter of credit was not a party to the sales contract but an Iranian bank which had issued a performance bond as security to the buyer for the seller's contractual performance.

The cases have generally involved contracts calling for the delivery of international communications equipment or services pertaining to it by Ameri-

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<sup>36</sup>*Id.* at 1296.

<sup>37</sup>This conclusion does not appear to have been weakened or, for that matter, buttressed by the recent ruling of District Court Judge A. Andrew Hauk dismissing an antitrust action brought by the International Association of Machinists and Aerospace Workers, the nation's third largest union, against the Organization of Petroleum Exporting Countries and its thirteen member nations. *IAM v. OPEC*, No. 78-5012 (S.D. Cal. 1979). See *The National Law Journal*, September 10, 1979, at 15. The decision had not yet been reported officially as this issue of *The International Lawyer* went to press.

<sup>38</sup>See *Venizelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461, 465 (2d Cir. 1970).

can manufacturers to Iranian buyers, often the old Imperial Government itself or one of its departments or agencies. As the collapse of the government and its successor's uncertain hold on civil authority in Iran threw the status of the contracts into doubt, a number of the sellers sought to enjoin the American banks from making payments under the standby letters of credit they had issued, notwithstanding the irrevocability of those letters.

The material facts in the most recently reported decision are typical of the genre. In *American Bell International Inc. v. The Islamic Republic of Iran*<sup>39</sup> plaintiff, a wholly owned subsidiary of American Telephone & Telegraph Co., entered into a contract with the Imperial Government's Ministry of War in July 1978 to provide counselling services to the government in connection with the massive program the government had undertaken to improve Iran's international communications system. The contract called for a complex method of payment to Bell, totaling \$280 million altogether, including a down payment of almost \$39 million. It gave the government the right to demand return of the down payment at any time, but the amount returnable was to be reduced by application of a formula tied to the amounts already invoiced by Bell to which the government did not object. At the time of the trial, approximately \$30 million of the down payment remained returnable.

To secure the down payment's return on demand Bell had to obtain an unconditional and irrevocable letter of guaranty running in favor of the government, in the amount of the down payment, from an Iranian bank (Bank Iranshahr) which appears to have had more than a commercial link to the government. The contract stipulated that the letter of guaranty was to be governed by the laws of Iran and that all disputes arising under it were to be resolved by Iranian courts.

Bank Iranshahr required Bell to obtain a standby letter of credit, in the amount of the bank's guaranty, to secure the bank's reimbursement in the event it had to make payments to the government under the guaranty. Manufacturers Hanover Trust Co., co-defendant in the instant suit, had issued the standby credit.

Bell commenced performance of the services contracted for and submitted some invoices which were paid. However, in late 1978 and early 1979 the revolutionary turmoil in Iran, including the overthrow of the Imperial Government itself, led to Bell's being left with unpaid invoices and contract claims. When it finally ceased its performance in January 1979, Bell claimed the contract had been breached by the Imperial Government and repudiated by its successor. On February 16th, before any demand had been made by Bank Iranshahr for payment under the letter of credit, Bell and its parent company brought an action against Manufacturers Hanover in a New York state court seeking a preliminary injunction prohibiting the bank from honor-

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<sup>39</sup>79 Civ. 3904 (RO) (S.D.N.Y. Aug. 4, 1979). References to and quotations from the case herein are to the LEXIS retrieval of the slip opinion.

ing any demand for payment under the letter of credit. The court denied plaintiff's motion<sup>40</sup> and its decision was upheld by New York's Appellate Division.<sup>41</sup>

However, on July 25 and 29 Manufacturers Hanover received telexed demands from Bank Iranshahr for payment of approximately \$30 million under the letter of credit, *i.e.*, the remaining balance of the down payment returnable to the Iranian government under the underlying service contract. Asserting that the demand did not conform strictly to the terms of the letter of credit, Manufacturers Hanover declined payment and so informed both Bank Iranshahr and Bell. Bell thereupon filed the instant action, seeking a temporary restraining order and leading to its motion for a preliminary injunction.<sup>42</sup>

Judge Lloyd F. MacMahon concluded that Bell had failed to sustain the burdens imposed in the Second Circuit on plaintiffs seeking a preliminary injunction. The test there, as set forth in *Caulfield v. Board of Education*,<sup>43</sup> is a showing of "possible irreparable injury and either:

- (1) probable success on the merits or
- (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief."

On the question of irreparable injury, Judge MacMahon acknowledged that there was "credible evidence that the Islamic Republic is xenophobic and anti-American and that it has no regard for consulting service contracts such [as the one in question]." Although Bell had made no effort to invoke the aid of Iranian courts, Judge MacMahon thought the situation in Iran, as shown by the evidence, warranted the conclusion that any such effort by Bell would

<sup>40</sup>*American Bell International, Inc. v. Manufacturers Hanover Trust Co.*, No. 3157/79 (Sup. Ct. March 27, 1979).

<sup>41</sup>\_\_\_\_\_, App. Div. \_\_\_\_\_, 418 N.Y.S.2d 551 (1st Dep't June 26, 1979). At that time, Bell and AT&T contended that since their contracts were with the Imperial Government, any demand for payment by representatives of the new government would be fraudulent. This reasoning may have been suggested to plaintiffs by dictum in *Stromberg-Carlson Corp. v. Bank Melli Iran*, 467 F. Supp. 530, 532 (S.D.N.Y. 1979), in which District Judge Edward Weinfeld, granting an injunction in a similar case last March, said that in the chaotic circumstances that then existed in Iran, a serious threat existed that a fraudulent or nonauthentic demand could be issued on the bank guaranty. *Accord Harris International Telecommunication, Inc. v. Bank Melli Iran*, No. 79-802 (S.D.N.Y. Feb. 22, 1979). *Contra Harris Corporation v. Bank Melli Iran*, No. 79 c 560, and *Stromberg-Carlson Corp. v. Continental Illinois Bank & Trust Co. of Chicago*, No. 79 c 810 (N.D. Ill., E.Div., March 22, 1979). See also *United Technologies Corp. v. Citibank*, 469 F. Supp. 473 (S.D.N.Y. 1979).

<sup>42</sup>Following argument, the District Court for the Southern District of New York on July 29 granted a temporary restraining order enjoining Manufacturers Hanover from making any payment to Bank Iranshahr until 48 hours after it notified Bell of its receipt of a conforming demand. That order was then extended pending decision on Bell's motion for a preliminary injunction. On August 1st Manufacturers Hanover notified Bell it had received a conforming demand. Evidentiary hearings were held on August 3. The court denied plaintiff's motion on August 4.

<sup>43</sup>583 F.2d 605, 610 (2d Cir. 1978).

be futile. But whereas the same line of reasoning had led Judge Edward Weinfeld of the Southern District, in March, to grant an injunction to a plaintiff in a substantially similar predicament,<sup>44</sup> it failed to persuade Judge MacMahon, who doubted that Bell lacked an effective remedy, since, he said, Bell could bring an action against the defendant in federal court under the Foreign Sovereign Immunity Act of 1976.<sup>45</sup>

To succeed on the merits, Judge MacMahon said, Bell would have to prove that either a conforming demand had not yet been made or that the demand should not be honored because of fraud in the transaction. He thought it unlikely that Bell would be able to prove nonconformity or fraud. The question of strict conformity with the terms of the letter of credit arose because of technical differences in the name of the Iranian bank making the demand, although one supposes that plaintiff was also arguing that the technical difference reflected a more substantive change in the bank's identity following the revolution. Judge MacMahon noted that the United States Government had recognized the present government of Iran as successor to the Imperial Government and that such recognition was binding on the courts. The court was free to decide for itself the consequences of such recognition upon the litigants in the case, he said, but American courts have traditionally viewed contract rights as vesting not in any particular government but in the state of which that government is an agent. An opposite answer to the conformity question would elevate form over substance and "would render financial arrangements and undertakings worldwide wholly subject to the vicissitudes of political power." Even a nonviolent, unanimous transformation of the form of government or, as in the present case, the mere change of a government agency, would be enough to warrant an issuer's refusal to honor a demand.

Once the strict conformity of the demand has been established, the court said, the issuer of an irrevocable, unconditional letter of credit has an absolute duty to transfer the funds, independent of the underlying contractual relationship that gives rise to the letter of credit, unless a germane instrument is found to have been forged or fraudulent or there is "fraud in the transaction."<sup>46</sup> Bell claimed the latter and argued for an interpretation of the word "transaction" that would look at the totality of circumstances in which the letter of credit is a part. Manufacturers Hanover urged an interpretation limited to the letter of credit itself. Judge MacMahon determined that while Bell had "some chance of success on the merits," Iran's repudiation of the contract, if indeed it could be shown to have been repudiation at all, did not amount to fraud. To hold otherwise, he said, the court would have to presume bad faith on Iran's part.

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<sup>44</sup>*Stromberg-Carlson Corp. v. Bank Melli*, 467 F. Supp. 530 (S.D.N.Y. 1979). See also the other cases cited in note 41, *supra*.

<sup>45</sup>28 U.S.C. §§ 1602 *et seq.*

<sup>46</sup>See *N.Y. U.C.C. § 5-114(2); United Bank, Ltd. v. Cambridge Sporting Goods Corp.*, 41 N.Y.2d 254, 392 N.Y.S.2d 265 (1976).

As to that part of the test dealing with serious questions and the balance of hardships, the court felt that the balance did not tip "decidedly" in Bell's favor, if at all. Even on equitable grounds alone, the court could not be overly sympathetic to Bell's situation since, as an experienced international business organization, it had willingly assumed the risk inherent in the terms of the contract in order to seek the commercial rewards the contract offered.

As in similar cases, Judge MacMahon also expressed concern over the substantial hardships which the bank issuing the letter of credit would face if he granted the relief Bell sought. Not only could Iran hold Manufacturers Hanover liable for consequential damages beyond the \$30 million, there was also no guarantee that Bank Iranshahr or the Iranian government, in retaliation for Manufacturers' recalcitrance, would not nationalize Manufacturers' assets in Iran.

### Statutory Use of *Treaty* Interpreted

In using the word *treaty* in statutes, Congress does not always indicate whether it has in mind the word's constitutional or international law meaning. That a great deal can ride on which meaning is inferred is illustrated by a case decided last March by the federal District Court for the District of Columbia.

*Rossi v. Brown*<sup>47</sup> concerned a base labor agreement (BLA) between the United States and the Philippines which provides for the preferential hiring of local nationals at United States military bases in the Philippines. At issue was whether the BLA is a "treaty" within the meaning of 5 U.S.C. section 7151 note (1976) ("§7151") which bars discrimination against American citizens at United States military bases overseas "[unless] prohibited by treaty." In other words, does the statutory provision mean a treaty in the constitutional sense — *i.e.*, an agreement between nations approved by the Senate under its "advice and consent" powers—or in the broader international sense of any binding agreement between the governments of two nations? In granting partial summary judgment for the defendants, the court concluded that the statute refers to the international use of the word.

The material facts were not in dispute. Plaintiffs were American citizens employed as civilians at the United States Naval Station at Subic Bay in the Philippines. In March 1978 they were notified that the classification of the position they held would be converted to a "local national" one which under the BLA<sup>48</sup> could only be filled by Philippine nationals. The BLA had not been submitted to the Senate as a "treaty" in the constitutional sense, having been negotiated by the United States Government pursuant to a 1944 statute<sup>49</sup>

<sup>47</sup>467 F. Supp. 960 (1979).

<sup>48</sup>Base Labor Agreement of May 27, 1968, T.I.A.S. No. 6542, art. 1.

<sup>49</sup>22 U.S.C. § 1392 (1976). The statutory authorization led to an initial military base agreement in 1947, T.I.A.S. No. 1775, which has been the subject of periodic renegotiation, and the BLA at issue in the instant case.

which authorizes the President "to withhold or to acquire and to retain such bases, necessary appurtenances to such bases, and the rights incident thereto, . . . as he may deem necessary for the mutual protection of the Philippine Islands and of the United States." Plaintiffs instituted administrative proceedings at the Subic Bay Naval Station, contending that their proposed termination constituted unlawful discrimination on the basis of citizenship, actionable, *inter alia*, under section 7151. Local officers at the Subic Bay Station rejected plaintiffs' complaint, concluding that neither they nor the Department of the Navy had the authority unilaterally to modify the BLA.<sup>50</sup>

The court had before it cross-motions for summary judgment which required a ruling on the legality of article I of the BLA and its status within the meaning of the statute. Plaintiffs took the position that Congress must be presumed to have had in mind the distinction between *treaty* and *executive agreement* which exists under American constitutional law. They argued that their position is supported by the legislative history of section 7151 and by contemporaneous legislation employing the term "treaty," as well as by interpretations of the General Accounting Office and, until 1977, the Department of State. They also contended that by enacting various laws prohibiting discrimination, Congress had expressed its clear intention to prevent discrimination against American citizens at overseas military bases. They argued that the Constitution's supremacy clause<sup>51</sup> prevents the BLA from overriding conflicting congressional enactments unless the BLA is a treaty in the constitutional sense.

Defendants asserted that although the BLA was never submitted to the Senate for advice and consent and is not a treaty in the constitutional sense, it is nonetheless a valid and binding international obligation of the United States, entered into pursuant to congressional authority, and thus is a "treaty" within the meaning of section 7151. According to defendants, the legislative history of that section is so sparse, and the wording of the relevant clause so awkward,<sup>52</sup> that it would be a mistake to conclude that Congress intended to upset numerous international agreements by a statute so hastily passed.<sup>53</sup> They urged the court to employ principles of judicial deference when interpreting the word *treaty* in order to avoid upsetting existing relations with other nations and to refrain from interfering with the executive branch's conduct of foreign relations.

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<sup>50</sup>Plaintiffs were subsequently fired, ahead of schedule, pursuant to a reduction in force. They claimed it was retaliation. But that issue was not before the court in the instant proceedings.

<sup>51</sup>U.S. CONST. Art. 6 para. 2.

<sup>52</sup>The awkwardness came from the use of the word *prohibited*, rather than *provided* or *permitted*, in the phrase "unless prohibited by treaty."

<sup>53</sup>Defendants pointed to the total absence of intent to upset existing international agreements, even though when section 106 was enacted numerous international agreements similar to the BLA were in force between the United States and other nations and none of these had been submitted to the Senate for advice and consent.

The court agreed with defendant's position, particularly in view of the absence of a showing of persuasive legislative history supporting the interpretation plaintiffs were urging. It said that the BLA is not, strictly speaking, an "executive agreement": "It is what one commentator has labelled a 'Congressional-Executive Agreement'," because Congress had authorized the President in advance to negotiate and conclude an agreement on that particular subject."<sup>54</sup> The court conceded that it could be maintained that Congress in 1972 had withdrawn a portion of the authority it had granted the President in 1944, but said that this interpretation, too, turned squarely on the intent of Congress, to the extent it could be gauged by an examination of the legislative history of section 7151 and bearing in mind that American courts are traditionally reluctant to infer an intent to overturn international agreements in the absence of strong indication that Congress has meant to do so. That reluctance, absent clear legislative history which would have overcome it, was ultimately more burden than plaintiffs' interpretation could bear. So far as the court was concerned, the BLA was one kind of "treaty" Congress may be presumed to have had in mind when it provided the "treaty" exception to section 7151.

The court disagreed with a suggestion in defendant's cross-motion for summary judgment that the controversy was nonjusticiable. The case did not require it to interpret the terms of a treaty or to "meddle in areas of foreign import which had been traditionally regarded as the province of the President," the court said.<sup>55</sup> It simply required construction of an act of Congress, the impact on foreign affairs of which did not render the case nonjusticiable but did "persuade the court that the construction urged by the plaintiffs would have to be supported by a far firmer basis than that existing here."<sup>56</sup> In particular, the probability that an adverse interpretation of section 7151 would invalidate the preferential hiring provisions of the dozen other international base labor agreements to which the United States is a party "persuades the court to act cautiously in an area fraught with sensitivity and affecting foreign affairs of the United States."<sup>57</sup>

### International Law as a Federal Question

Twenty-eight U.S.C. § 1350 grants federal district courts subject matter jurisdiction in "any civil action by an alien for a tort only, committed in violation of the law of nations." Although it originated in the Judiciary Act

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<sup>54</sup>L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 173 (1972). The court noted that while acknowledging that the constitutional basis of such agreements is unclear, Professor Henkin had pointed out that neither Congresses nor Presidents nor courts have been troubled by these conceptual difficulties and differences. *Id.* at 175.

<sup>55</sup>467 F. Supp at 968.

<sup>56</sup>*Id.*

<sup>57</sup>*Id.*

of 1789<sup>58</sup> and its language has remained essentially intact ever since,<sup>59</sup> Section 1350 is rarely invoked<sup>60</sup> and both its purpose and its scope remain obscure.<sup>61</sup> The courts have tended to construe narrowly its reference to the "law of nations,"<sup>62</sup> hinting that such a construction is necessary if Section 1350 is to be kept within the confines of Article III of the Constitution.<sup>63</sup>

A case being argued on appeal to the Second Circuit illustrates the problem section 1350 can pose. *Filartiga v. Pena-Irala*<sup>64</sup> is a \$10 million civil action in tort only for the wrongful death in Asuncion, Paraguay, in March 1976, of Joelito Filartiga, the seventeen-year-old son of Dr. Joel Filartiga, one of the plaintiffs (the other being the victim's sister, Dolly).<sup>65</sup> Dr. Filartiga is an internationally known physician, artist, poet and outspoken critic of Paraguay's President, Alfredo Stroessner. The Filartigas' complaint alleges that Joelito Filartiga died while being subjected to systematic torture by defendant Americo N. Pena-Irala, acting under color of his apparent authority as Inspector General of the Police in Asuncion.<sup>66</sup>

Plaintiffs contend that insofar as torture is a tort committed in violation of international law, the district court has subject matter jurisdiction of the action under section 1350 or, alternatively, 28 U.S.C. § 1331.<sup>67</sup> The thrust of plaintiffs' argument, on appeal, is that section 1350 gives federal courts concurrent jurisdiction over torts involving aliens which also violate interna-

<sup>58</sup>1 Stat. 73. The formal title of the statute is "An act to establish the Judicial Courts of the United States."

<sup>59</sup>§1350 derives from 28 U.S.C. § 1940, ed., § 41(17) (March 3, 1911, c. 231, § 24, par. 17, 36 Stat. 1093). The words *civil action* were substituted for *suits* in view of Rule 2 of the Federal Rules of Civil Procedure. See *Lopes v. Reederei Richard Schroeder*, 225 F. Supp. 292 (E.D. Pa. 1963); and *Valanga v. Metropolitan Life Ins. Co.*, 259 F. Supp. 324 (E.D. Pa. 1966).

<sup>60</sup>See Annotation, Construction and Application of 28 USCS § 1350, Giving United States District Courts Jurisdiction of Action by Alien for Tort Only, Committed in Violation of Law of Nations or Treaty of United States, 34 A.L.R. Fed. 388 (1977).

<sup>61</sup>The Second Circuit has called it "a kind of legal Lohengrin; . . . no one seems to know whence it came." *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

<sup>62</sup>See Annotation, *supra* note 60, at 390n.

<sup>63</sup>E.g., *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975).

<sup>64</sup>No. 79-917 (E.D.N.Y. May 14, 1979), *appeal docketed* No. 79-6090 (2d Cir. May 16, 1979).

<sup>65</sup>Dr. Filartiga is suing in his individual capacity as well as in his capacity as his son's legal representative. Dolly Filartiga alleges that she too was a victim of the tortious act that led to her brother's death, *inter alia* having been forced by defendant or his agents to view the mutilated body of her brother. Personal jurisdiction over the defendant was obtained while he was awaiting deportation back to Paraguay from the United States after having entered this country illegally following his removal from the Asuncion police force.

<sup>66</sup>Plaintiffs charge that Joelito was singled out for torture because of the dissident political activities of his father. Critics have long alleged that since Gen. Stroessner assumed power in a 1954 coup d'état, he has systematically purged opponents of his regime from the nation's political, economic, social and religious institutions and that the Paraguayan government's secret police have arbitrarily arrested, tortured and even executed dissidents.

<sup>67</sup>Like section 1350, section 1331 gives federal courts jurisdiction without regard to diversity of the parties. But whereas section 1350 contains no amount of controversy requirement, § 1331 does (\$10,000). Consequently, even if § 1331 is available in the present case to the extent that international law is deemed to be a federal question, its jurisdictional amount requirement could limit its usefulness to other foreign plaintiffs alleging human rights violations as a cause of action.



tional law and thus have potential international implications. They contend that death by torture is a transitory tort over which state courts have jurisdiction under the principles of private international law and Anglo-American jurisprudence.<sup>68</sup> However, they add, section 1350's antecedent statute was enacted to implement the Constitution's framers' preference for federal adjudication of cases of concern to the nation as a whole, particularly ones whose outcome could have an impact on international relations and involve the rights of aliens.<sup>69</sup> Thus, they assert, Congress in the relevant portion of the Judiciary Act gave federal courts jurisdiction over alien tort claims which combine alienage with violations of treaties or the law of nations in general.<sup>70</sup> In plaintiffs' view, the question before the court is whether torture is a tort in violation in international law. They contend it is.<sup>71</sup>

This line of reasoning causes the case to turn on how the words "law of nations" are defined. When seized with question four years ago in *IIT v. Vencap, Ltd.*,<sup>72</sup> the Second Circuit rehabilitated a somewhat dated definition of "law of nations." The conduct complained of in *Vencap* involved securities fraud, conversion and corporate waste in connection with the demise of the IOS Ltd. mutual fund empire which brought the names of Bernard Cornfeld and later Robert Vesco to international attention. The Second Circuit, in dictum, said that the Eighth Commandment "Thou shalt not steal" is not a part of the law of nations, adding that "while every civilized nation doubtless has [prohibitions against stealing] as part of its legal system, a violation of the law of nations arises only when there has been a violation by one or more individuals of those standards, rules, or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or dealings *inter se*."<sup>73</sup>

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<sup>68</sup>Brief for Plaintiffs-Appellants at 11.

<sup>69</sup>*Id.* at 15. In THE FEDERALIST No. 80, Alexander Hamilton argued in support of federal jurisdiction of all causes in which aliens are concerned, warning that denials or perversions of justice by the sentences of courts was classed among the just causes of war. See generally Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26 (1952).

<sup>70</sup>As noted, *supra* note 67, section 1350 does not require diversity of citizenship between the parties. Diversity jurisdiction being already available where an alien sued a nonalien (or vice versa), the original § 1350 was necessary to provide federal jurisdiction over alien tort claims only where both parties were aliens, according to plaintiffs. Brief for Plaintiffs-Appellants at 18, *Filartiga v. Pena-Irala*, No. 79-6090 (2d Cir.).

<sup>71</sup>Plaintiffs apparently do not contend that their claim arises directly from a treaty to which the United States is a party. That argument appears to be taken up in briefs amici curiae filed by two groups of private associations concerned with the protection of human rights. See Brief for Amnesty International-U.S.A., International League for Human Rights, and The Lawyers' Committee for International Human Rights, as Amici Curiae, at 6; and Brief for the International Human Rights Law Group, The Council on Hemispheric Affairs, and The Washington Office on Latin America, as Amici Curiae, at 6. Plaintiffs themselves contend that relevant treaties, including the United Nations Charter, are among the sources of applicable international law. See Brief for Plaintiffs-Appellants at 23n.

<sup>72</sup>519 F.2d 1001 (2d Cir. 1975).

<sup>73</sup>*Id.* at 1015.

In dismissing the Filartigas' complaint last May, Judge Eugene H. Nickerson of the Eastern District of New York said he felt constrained by the narrow definition of "law of nations" the Second Circuit had adduced in *Vencap* and reiterated in a later case.<sup>74</sup> In their appeal, the Filartigas argue that, so read, section 1350 is too narrow and inconsistent with the framers' intent. "In 1789, as well as today, the law of nations included proscription of individual conduct viewed as an offense against humanity," they argue.<sup>75</sup> "Moreover, the entire development of modern international law, which since Nuremberg has elevated protection of human rights to a central concern of the world community, compels recognition of torture as a violation of international law."<sup>76</sup>

In any event, they add, the condemnation of torture meets *Vencap*'s statist test in that it is designed to serve the common good of all nations, and the practice of torture necessarily affects relations between states. "Indeed," their brief states, "the commitment to eradicate torture and other gross human rights violations has become one of the touchstones of [United States] foreign policy, affecting [its] relations with many nations, not the least of which is Paraguay itself."<sup>77</sup>

Defendant-appellee contends that "plaintiffs' argument, reduced to its essentials, is that, by virtue of 28 U.S.C. § 1350, the District Courts of the United States have jurisdiction over any case of 'torture,' whenever and by whomever it may have been committed, at least when it was politically inspired."<sup>78</sup> "The Constitution does not permit such an expansive reading of the jurisdictional grant contained in 28 U.S.C. § 1350 and the language of the statute does not require it."<sup>79</sup> That is, to the extent that section 1350's reference to a "tort committed in violation of the law of nations" is read to refer, say, to an act involving an ambassador or consul or one of the other specific categories of cases and controversies as to which the federal judicial power is extended by Article III section 2 of the Constitution, the statute's constitutionality is clear.<sup>80</sup> But what is the constitutional basis for a reading of section

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<sup>74</sup>*Dreyfus v. von Finck*, 534 F.2d 24 (2d Cir. 1976), involved confiscation of property by the Nazi regime in Germany and a later repudiation of settlement. Plaintiffs in the case were unable to show a violation of customary or conventional (treaty) international law.

<sup>75</sup>Brief for Plaintiffs-Appellants at 10.

<sup>76</sup>*Id.*

<sup>77</sup>*Id.*

<sup>78</sup>Brief for Defendant-Appellee at 4.

<sup>79</sup>*Id.*

<sup>80</sup>Defendant suggests that section 1350's antecedent statute might have been a direct outgrowth of the De Longchamps affair. Charles Julian De Longchamps, known as Chevalier De Longchamps, was a French military officer who, in 1784, was convicted in a state court in Pennsylvania of "unlawfully and violently threatening and menacing bodily harm and violence to the person of" one Francis-Barbe De Marbois, Secretary to the Legation from France and Consul General of France to the United States. De Longchamps had insulted De Marbois at the French consulate in Philadelphia and the two had had a scuffle later in the street. Although De Marbois apparently had the better of the fight, he and the French government were not easily mollified by what they regarded as an insult to France, albeit by another Frenchman. The

1350 (or section 1331, for that matter) which would extend its construction to the instant case? Not the matters itemized in Article III section 2, defendant asserts, only, arguably, that section's more general language extending jurisdiction to "all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties."<sup>81</sup>

The question thus becomes whether a claim such as plaintiffs' can be entertained by federal courts as a "federal question," i.e., one "arising under" the Constitution, the laws of the United States and treaties. Defendant says no and reasons thus: Plaintiffs do not assert that they have a claim under the Constitution and would have no justification for doing so. In constitutional terms a case does not "arise under" a jurisdictional statute—such as section 1350 or section 1331—which implements part of the constitutional grant of federal question jurisdiction by authorizing federal district courts to entertain suits arising under the laws of the United States. A case "arises under" a statute only when the substantive claim depends upon the specific statute. "Of course," defendant asserts, "no statute of the United States makes it a crime or a civil wrong for one Paraguayan to injure another Paraguayan in

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Pennsylvania court declined France's request to deliver up De Longchamps or, in the alternative, to have the court sentence him to a stay in prison terminable only upon the French sovereign's declaration that the reparation was satisfactory. But the court fined De Longchamps severely, sentenced him to two years' imprisonment, and put him on bond for a further period. *Republica v. De Longchamps*, 1 U.S. 111 (Dall. 1784), is usually cited as an example of a pre-constitutional conviction for an uncoded crime. See address by L. Meeker, Seattle, Washington, April 20, 1956, reprinted in 1 WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 106. Chief Justice McKean of the Pennsylvania court had said that "the first crime in the indictment [i.e., for the assault at the consulate] is an infraction of the law of nations. This law, in its full extent, is a part of the law of this state, and is to be collected from the practice of different nations, and the authority of writers." 1 U.S. at 116.

That assault of a consul was, in fact, a violation of the law of nations in 1784 is by no means certain. See Letter of Secretary for Foreign Affairs Jefferson to Mr. Newton, September 8, 1791, reprinted in 5 MOORE, *DIGEST OF INTERNATIONAL LAW* 33-34. But the court's deference to the French government's sensitivity is unquestionably accurate in its reflection of the awareness that then prevailed of the potential for national embarrassment implicit in the Confederation's inability to conduct international affairs in behalf of the states. See Frank, *Historical Bases of the Federal Judicial System*, 13 L. & CONTEMP. PROB. 3, 13 (1948). Plaintiffs in the *Filartiga* case correctly point out that the preeminence accorded to the federal courts over matters which could have a bearing on foreign relations is a product of this awareness and especially of fears that unjust or unwise judicial sentences could be used as a pretext for war against the states. See THE FEDERALIST NO. 80 (A. Hamilton). Whether defendant is correct in ascribing to the De Longchamps affair in particular the motivation for the section of the Judiciary Act from which §1350 derives is, of course, another matter entirely. The De Longchamps affair may have been in the minds of the framers of the Constitution when they provided Congress with the power to define and punish offenses against the law of nations, since one effect of that provision would appear to be to put an end to indictments for uncoded crimes against the law of nations. See Meeker, *supra* this note. Similarly, the extension of federal courts' jurisdiction to cases involving consuls, as well as ambassadors and other public ministers, may, beyond reflecting general concern with the suitability of state courts deciding matters bearing upon the conduct of foreign relations, reflect lingering questions raised by the De Longchamps affair as well. But this, like defendant's suggestion that the De Longchamps affair was the inspiration for the forerunner of section 1350, is a matter of conjecture for which concrete evidence has not yet been produced.

<sup>81</sup>Brief for Defendant-Appellee at 4-7.

Paraguay and plaintiffs' substantive claim is not based on any such statute."<sup>82</sup>

Defendant adds that whatever else Section 1350's antecedent was intended to accomplish, it "was not intended to adopt the law of nations, wholesale, as United States law."<sup>83</sup> Quoting from the debate at the Constitutional Convention of 1787 on the use of the phrase "law of nations" in Article I,<sup>84</sup> defendant notes that one of the delegates remarked upon "the law of nations being often too vague and deficient to be a rule."<sup>85</sup> Very likely, defendant says, that was also the reason the phrase was consciously omitted from the definition of cases to which Article III extended the jurisdiction of the federal courts.<sup>86</sup> In at least two draft proposals submitted to the Convention's Committee of Detail, the "law of nations" was expressly referred to as a category of cases to which the jurisdiction of the federal courts would extend.<sup>87</sup> Noting that those proposals have at least some similarity to Article III as adopted, defendant further notes that Article III itself does not expressly use the term "law of nations." The reason, he suggests, is the vagueness to which the delegate above mentioned referred. Defendant observes that a majority of the first Congress, which enacted the Judiciary Act, had been delegates to the Constitutional Convention.<sup>88</sup> Why, then, he asks, did they use the vague phrase in Section 1350's antecedent in the Judiciary Act?

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<sup>82</sup>*Id.* at 7. The Brief for Amnesty International—U.S.A., International League for Human Rights, and Lawyers' Committee for International Human Rights, as Amici Curiae, citing *Spiesel v. City of New York*, 239 F. Supp. 106, 108 (S.D.N.Y. 1964), argues, at page 21, that the mere assertion of a federal question is sufficient to give the federal district court jurisdiction to determine it, unless the assertion is plainly insubstantial.

<sup>83</sup>Brief for Defendant-Appellee at 24.

<sup>84</sup>Section 8, cl. 10.

<sup>85</sup>II FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 614 (rev. ed. 1937). The draft being considered at the time contained a sentence not unlike that which finally emerged but which gave Congress the power to define and punish piracy and felonies on the high seas but just to "punish" offenses against the law of nations. Gouverneur Morris moved to delete the word "punish" so as to remove the inference that Congress' power over the latter offenses was different from its power with respect to piracy and felonies on the high seas. *Id.* James Wilson, like Morris a lawyer and a delegate from Pennsylvania, objected, saying that "to pretend to *define* the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance that would make us ridiculous." *Id.* at 615. Mr. Morris said "the word *define* is proper when applied to *offences* in this case; the law of (nations) being often too vague and deficient to be a rule." *Id.* His motion to strike out the word *punish* was adopted, six votes to five. *Id.*

<sup>86</sup>Defendant ascribes Gouverneur Morris' view to the majority who voted for his motion, although there does not appear to be any record of why the delegates voted the way they did.

<sup>87</sup>*I.e.*, the Pinckney Plan and, apparently, the New Jersey Plan. The Pinckney Plan would have authorized Congress to constitute a federal judicial court to which appeals would be allowed from state courts "in all Cases wherein Questions shall arise on the Construction of Treaties made by [the United States]—or on the Law of Nations." *Id.* at 136. The New Jersey Plan would have given the federal judiciary jurisdiction "in all Cases in which Foreigners may be interested in the Construction of any Treaty, or which may arise on any Act for regulating Trade or collecting Revenue or on the Law of Nations, or general commercial or marine Laws." *Id.* at 157. The emphasis is in the original, apparently to indicate writing added to an original version by the author of the New Jersey Plan.

<sup>88</sup>See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

The logical explanation is that the section of the Judiciary Act in which the phrase appears is a jurisdictional statute; jurisdictional provisions of Article III (except those conferring jurisdiction on the Supreme Court) are not self-executing; in adopting the antecedent of 28 U.S.C. section 1350, Congress was merely providing that the federal courts, despite the absence of a statute conferring general federal question jurisdiction, would be able to exercise jurisdiction to enforce any statute thereafter enacted by Congress pursuant to its express power "to define . . . offenses against the law of nations." Of course, at least insofar as is relevant to this case, Congress has not enacted a statute defining any part of the law of nations.<sup>90</sup>

Defendant argues that none of the *treaties* which condemn torture themselves provide a basis for a cause of action. Plaintiffs do not appear to argue that the treaties themselves create a cause of action,<sup>91</sup> arguing instead that in their condemnation of torture these treaties, along with other relevant resolutions and declarations, evidence prevailing norms of international law, helping to crystalize that law, thus triggering the applicability of jurisdictional statutes which are tied to international law through the federal question generally or, in so many words, like Section 1350. A review of this evidence, they say, shows torture to be universally regarded as violative of international law.

Plaintiffs assert that torture today occupies the role piracy occupied when the Constitution and the Judiciary Act were written.<sup>92</sup> This analogy finds expression in plaintiffs' more general premise that in enacting the Judiciary Act's version of Section 1350 Congress meant to carry out the Constitution's draftsmen's intention to allocate to the federal courts jurisdiction over matters which could affect the nation's foreign relations. Thus viewed, one might here note, section 1350 could be used to advantage by alien victims of international human rights violations who are able to obtain personal or, one supposes, in rem jurisdiction to go with Section 1350's (or Section 1331's) grant of subject matter jurisdiction. That prospect is viewed with less than sanguinity by defendant, who charges that "plaintiffs have sought to invoke the jurisdiction of the District Court in order to stage a show trial for propaganda purposes."<sup>93</sup> "Presumably," defendant's brief adds, "that is the reason that they still persist in their suit even though the defendant has now left this jurisdiction and there is no showing that he has any assets here."<sup>94</sup>

That being so, defendant argues, the judiciary is being put in the position of determining the foreign policy of the United States, or at least of intruding upon the conduct of American foreign policy. "Such [an] intrusion . . . would be contrary to the fundamental constitutional principle of separation

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<sup>90</sup>Brief for Defendant-Appellee at 27. There is historical reason to believe, but no available documentary evidence to prove, that the antecedent to §1350 in the Judiciary Act was related to technical legal difficulties faced by the victims of piracy seeking to recover damages, as opposed to seeking to recover the converted property itself. The writer is developing this thesis and would welcome correspondence which might shed light on it, favorable or not.

<sup>91</sup>See note 71, *supra*.

<sup>92</sup>Brief for Plaintiffs-Appellants at 38.

<sup>93</sup>Brief for Defendant-Appellee at 28.

<sup>94</sup>*Id.*

of powers," says defendant,<sup>94</sup> inviting the Second Circuit to dismiss the case as one involving a "political" question.

Finally, and briefly, defendant urges the court to find that plaintiffs' claim is barred by the act of state doctrine. The premise of plaintiffs' claim, he says, unless it is that every killing accompanied by torture is a violation of international law, even when committed by a private citizen for personal motives against a compatriot within their common homeland, is that the conduct with which they charge defendant is the act of the Republic of Paraguay and, for that reason, a violation of international law.<sup>95</sup> In that event, defendant argues, what is at issue is the act of a foreign state that is precluded from the scrutiny of American courts by the act of state doctrine.

Apparently, the act of state defense was not raised at the district court level.<sup>96</sup> One of the amicus briefs urges the circuit court to find act of state irrelevant. Among other reasons it offers is that that doctrine is applicable where there is a legitimate diversity of values between the United States and the other national society involved, but that there can be no "legitimate diversity" when an abuse of universal human rights is at issue.<sup>97</sup> In such a case, "domestic courts fulfill their role by refusing to further the policy of the foreign legal system."<sup>98</sup>

No state can be heard to say that an act of torture is a publicly sanctioned act. No member of the international community can be heard to plead its own depravity as a defense to the exercise of jurisdiction over its national by an American court. To do so would be to commit a direct contravention of the judgment of the Nuremberg Tribunal . . . ."

The Paraguayan government has not interceded in the case, nor has defendant yet acknowledged any involvement in the events leading to Joelito Filartiga's death. In fact, the exact cause of death is a question at issue in a criminal trial in Paraguay. The government alleges that the youth was the victim of a jealous husband's rage. The Filartigas, challenging that version, filed a criminal action of their own in Paraguay, under a law which enables the victim of a crime, upon leave of the court, to prosecute in conjunction with the state but with his/her own lawyer and witnesses. Leave to file the suit was initially denied. But just before Judge Nickerson was to rule on defendant's motion to dismiss, which was based, in part, on a plea of *forum non conveniens*, the Paraguayan Supreme Court reversed the lower court's

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<sup>94</sup>*Id.* at 29.

<sup>95</sup>*Id.* at 34.

<sup>96</sup>The text of *Trends* was submitted for publication while plaintiffs-appellants were preparing a reply brief. Their original appellate brief did not discuss the act of state question, which was not then at issue.

<sup>97</sup>Brief for The International Human Rights Law Group, The Council on Hemispheric Affairs, and The Washington Office on Latin America, as Amici Curiae, at 28.

<sup>98</sup>*Id.*, quoting from R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 72 (1967).

<sup>99</sup>Brief for The International Human Rights Law Group, The Council on Hemispheric Affairs, and The Washington Office on Latin America, as Amici Curiae, at 28.

ruling, thus allowing Dr. Filartiga to proceed with his concurrent prosecution. The timing of the Paraguayan court's action, the circumstances surrounding it, and the ruling itself have led to charges that it was politically inspired, that is, with a view *inter alia* to supporting defendant's forum non conveniens plea in New York. As it turned out, Judge Nickerson did not address the issue, finding the question of subject matter jurisdiction separate and prior.<sup>100</sup>

The Filartigas allege that after Dr. Filartiga filed his suit in Paraguay, he, his family, friends and the attorney representing the family were subjected to a systematic campaign of harassment designed to dissuade and prevent them from pursuing their suit.<sup>101</sup> This allegedly included arrest and detention, without trial, of the victim's sister (co-plaintiff in the instant action) and her mother, and death threats by the defendant himself against the family and the attorney. "The attorney was arrested, shackled to a wall, charged with plotting murder and was illegally disbarred by a [Paraguayan] Supreme Court Justice who is also alleged to have instigated the murder complaint against him."<sup>102</sup>

This background places in perspective one answer offered to defendant's assertion that the Filartigas are staging a political show trial in the United States. That is, one of the amicus briefs argues that the district court will provide the only fair and impartial forum available to the Filartigas.<sup>103</sup>

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<sup>100</sup>Brief for Amnesty International-U.S.A., International League for Human Rights, and The Lawyers' Committee for International Human Rights, as Amici Curiae, at 22.

<sup>101</sup>See Brief for Plaintiffs-Appellants at 7n.

<sup>102</sup>*Id.* at 6-7.

<sup>103</sup>*Id.*

